

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPLAINT

NATURE OF ACTION

1. Plaintiff Federation for American Immigration Reform (“FAIR”) brings this action against Defendant Federal Bureau of Prisons (“BOP”) to compel its compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. On May 8, 2019, FAIR sought certain records from the BOP pursuant to FOIA regarding BOP’s collection of DNA samples from each individual in its custody who is, or has been, convicted of a federal offense or a qualifying District of Columbia offense. BOP violated FOIA by failing to respond to FAIR’s request within the required time period, by failing to follow the procedures required by FOIA, and by failing to disclose and release the requested records. As part of the relief prayed for in this action, FAIR

requests that this Court order BOP to respond to FAIR's FOIA request and to release all the responsive records that BOP improperly withheld.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

3. This Court has jurisdiction to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

4. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff FAIR is a non-profit entity organized under the laws of the District of Columbia and has its principal place of business at 25 Massachusetts Ave, N.W., Suite 330, Washington, DC 20001. FAIR is a tax-exempt organization under 501(c)(3) of the Internal Revenue Code. FAIR seeks to educate the citizenry on and increase public awareness of immigration issues, and hold the nation's leaders accountable for enforcing the nation's immigration laws. In furtherance of its public interest mission, FAIR regularly requests access to the public records of federal agencies and disseminates its findings to the public.

6. Defendant BOP is an agency within the United States Department of Justice (“DOJ”) and is headquartered at 320 First Street, N.W., Washington, D.C. 20534. BOP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1), and is subject to the provisions of FOIA. BOP has possession, custody, and control of the records to which FAIR seeks access.

STATEMENT OF FACTS

7. Congress has authorized the U.S. Attorney General to collect DNA samples from individuals arrested, facing charges, or convicted, or from non-U.S. persons detained under the authority of the United States. *See* 34 U.S.C. § 40702(a)(1)(A) (2019). The Attorney General may delegate that function within DOJ and also may authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to exercise any power of the Attorney General under 34 U.S.C. § 40702. BOP is responsible for collecting DNA samples from each individual in its custody who is, or has been, convicted of a federal offense or a qualifying District of Columbia offense. *See* 28 C.F.R. § 28.12(a) (2018).

8. On May 8, 2019, FAIR (through its agent, the Immigration Reform Law Institute) submitted a FOIA request to BOP, via the agency's online FOIA portal, and also sent a paper version of the request to BOP by certified mail, return receipt requested, on May 8, 2019. Upon information and belief, BOP received the electronic version of FAIR's FOIA request on May 8, 2019.

9. BOP also received the paper version of the FAIR's FOIA request sent by certified mail, return receipt requested.

10. FAIR's May 8, 2019, FOIA request to BOP requested that the agency produce the following records:

- 1) The number of DNA specimens collected by the BOP from all U.S. citizens, segregated by calendar or fiscal year, beginning on February 1, 2011 to the date of this search.
- 2) The number of DNA specimens collected by the BOP from all non-U.S. persons, segregated by calendar or fiscal year, beginning on February 1, 2011 to the date of this search.

- 3) The number of DNA specimens that the BOP submitted to the FBI Laboratory for analysis that resulted in a DNA match or hit (offender and forensic hits) for U.S. citizens, segregated by calendar or fiscal year, beginning on February 1, 2011 to the date of this search.
- 4) The number of DNA specimens that the BOP submitted to the FBI Laboratory for analysis that resulted in a DNA match or hit (offender and forensic hits) for non-U.S. persons, segregated by calendar or fiscal year, beginning on February 1, 2011 to the date of this search.

FAIR's May 8, FOIA request to BOP hereinafter is referred to as the "FOIA Request."

11. FAIR requested that search, review, and production fees for the FOIA Request be waived. In its request, FAIR cited the public interest purpose of its FOIA Request (*see* 5 U.S.C. § 552(a)(4)(A)(iii)) and also explained that FAIR qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). FAIR also cited and explained why it was entitled to a waiver of fees under DOJ's regulation located at 28 C.F.R. § 16.10 (2018).

12. *Inter alia*, the disclosure of records and information that FAIR seeks through the FOIA Request is in the public interest; will contribute significantly to the public's understanding of BOP's detainers; and is not primarily in FAIR's commercial interest. Indeed, FAIR, a non-profit organization, does not seek the requested records for any commercial benefit.

13. Other government agencies have acknowledged that FAIR is a "representative of the news media" for purposes of FOIA. Among other things, FAIR regularly publishes online periodicals (such as newsletters) and disseminates information through electronic communications.

14. BOP sent correspondence, dated May 8, 2019, by email acknowledging receipt of the FOIA Request and stating that BOP assigned number 2019-03816 to the FOIA Request.

15. The correspondence dated May 8, 2019, from BOP also stated, in part, that:

We determined unusual circumstances exist as the documents responsive to your request must be searched for and collected from a field office, and/or the documents responsive to your request are expected to be voluminous and will require significant time to review. Because of these unusual circumstances, we are extending the time limit to respond to your request for the ten additional days provided by the statute. Processing complex requests may take up to nine months. Pursuant to 28 C.F.R. § 16.5(b) and (c), you may narrow or modify your request in an effort to reduce the processing time.

16. The May 8, 2019, correspondence did not specify the date on which a determination was expected to be dispatched for the FOIA Request. The correspondence also stated, in part, that “[i]f you requested a fee waiver, we will make a decision whether to grant your request after we determine whether fees will be assessed for this request.” BOP, therefore, essentially stated that it was deferring a decision on the FAIR’s request for a fee waiver regarding the FOIA Request.

17. To the extent that FAIR could administratively appeal BOP’s deferral of a decision regarding FAIR’s request to waive all fees for the FOIA Request, BOP did not inform FAIR of that ability or of any deadlines that might apply. Accordingly, to the extent that FAIR could administratively appeal BOP’s deferral of FAIR’s request for a complete fee waiver, BOP failed to comply with the provisions of FOIA and violated FAIR’s rights, including by failing to notify FAIR of any applicable procedures or deadlines by which to appeal the deferral regarding the fee waiver request. *See 5 U.S.C. § 552 (a)(6)(A)(i)(I)-(III).*

18. In its May 8, 2019, correspondence, BOP stated that FAIR could narrow or the FOIA Request. The records that FAIR requested, however, were specific and limited in scope and should have been released without the need for any extension of time. Accordingly, FAIR did not narrow or modify the FOIA Request.

19. FOIA establishes deadlines by which federal agencies must respond to FOIA requests and release responsive documents. 5 U.S.C. § 552(a)(6)(A). A federal agency that is subject to FOIA and that receives a FOIA request must issue a determination within twenty (20) business days after receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). If the agency provides written notice to the requester explaining that “unusual circumstances” exist warranting additional time, the agency may be entitled to one ten (10) working day extension to respond to the FOIA request. 5 U.S.C. § 552(a)(6)(B). Within the deadlines established by FOIA, an agency must notify the requester of whether the agency has determined to comply with a request, and of the requestor’s right to appeal an adverse determination. *See* 5 U.S.C. § 552(a)(6)(A).

20. As an “agency” within the meaning of 5 U.S.C. § 552(f)(1), BOP must comply with the non-discretionary statutory requirements of FOIA.

21. FAIR submitted the electronic version of the FOIA Request to BOP via BOP’s Online Portal and by certified mail, return receipt requested, on May 8, 2019. Based on BOP’s correspondence dated May 8, 2019, BOP received the FOIA Request on May 8, 2019 – the same day that FAIR submitted the electronic version of the FOIA Request via BOP’s electronic portal.

22. The applicable time period under FOIA for an agency to provide a response and determination is twenty working days as provided in 5 U.S.C. § 552(a)(6)(A)(i) or the applicable period, if timely and properly invoked, in 5 U.S.C. § 552(a)(6)(B)(i)-(ii).

23. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), BOP was required to determine whether to comply with the FOIA Request within twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) after receipt of that request and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination unless BOP properly and timely invoked an extension under FOIA. *See* 5 U.S.C. § 552(a)(6)(B). Because BOP received

the FOIA Request on May 8, 2019, BOP was required to respond by June 6, 2019, unless BOP properly and timely invoked such an extension.

24. 5 U.S.C. § 552(a)(6)(B)(i) of FOIA provides that:

In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

25. 5 U.S.C. § 552(a)(6)(B)(ii) of FOIA provides, in part, that:

[w]ith respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.

26. FOIA, in 5 U.S.C. § 552(a)(6)(B)(iii), provides that:

As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests –

- (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

27. To the extent that BOP could not, or did not, properly and timely invoke the provisions of 5 U.S.C. § 552(a)(6)(B), BOP was required to respond to the FOIA Request by June 6, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(i). BOP, however, did not respond to the FOIA Request by June 6, 2019 or make a determination regarding the FOIA Request by that date. Accordingly, to the extent that BOP could not, or did not, properly and timely invoke the provisions of 5 U.S.C. § 552(a)(6)(B), BOP violated FAIR's rights under the statute. *See* 5 U.S.C. § 552(a)(6)(A)(i)(I)-(III).

28. Assuming that BOP received the FOIA Request on May 8, 2019, and that BOP properly and timely invoked a ten working day extension on May 8, 2019, in its correspondence, BOP still has violated FOIA and FAIR's rights under the statute. With a proper and timely ten working day extension of time, BOP was required to respond to the FOIA Request by June 20, 2019 and comply with the provisions of FOIA.

29. As of the date of this Complaint, however, BOP still has not complied with FOIA (including as required by 5 U.S.C. § 552(a)(6)(A)(i) and, to the extent applicable, 5 U.S.C. § 552(a)(6)(B)), and has violated FAIR's rights under the statute. Among other things, to the extent that 5 U.S.C. § 552(a)(6)(B) is applicable, BOP (i) failed to determine within thirty working days after receipt of the FOIA Request whether to comply with that request; (ii) failed to notify FAIR of any such determination and the reasons for such determination within the required time period; (iii) failed to advise FAIR of its right to appeal any adverse determination

of the FOIA Request; and (iv) failed to produce the requested records or otherwise demonstrate that the requested records are exempt from production.

30. FOIA specifically prohibits an agency that fails to respond timely to a FOIA request from charging certain fees to respond to the request. *See 5 U.S.C. § 552(A)(4)(viii)(I)-(II)(aa)-(bb).* Thus, because BOP failed to respond to the FOIA Request within the time required by law, BOP cannot charge FAIR for certain fees.

31. In any case, including for the reasons set forth in the FOIA Request, FAIR is entitled to a complete waiver of all fees in connection with the FOIA Request.

32. FOIA provides that:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C)(i).

33. Because BOP has failed to comply with the required time limit to respond to the FOIA Request, BOP has constructively denied the FOIA Request. FAIR, therefore, is deemed to have exhausted any and all administrative remedies with respect to the FOIA Request. *See 5 U.S.C. § 552(a)(6)(C)(i).*

34. FAIR has exhausted its administrative remedies regarding the FOIA Request, and, therefore, is entitled to petition this Court for injunctive and declaratory relief from BOP's withholding of the requested records. *See 5 U.S.C. § 552(a)(4)(B).*

35. FAIR has a legal right to the requested records. BOP improperly has withheld those records, forcing FAIR to file suit to enforce its rights under FOIA.

COUNT I

(Violation of FOIA, 5 U.S.C. § 552)

36. FAIR re-alleges paragraphs 1 through 35 as if fully stated herein.
37. BOP failed to respond to the FOIA Request within the statutory deadlines imposed by FOIA. As a result, BOP violated FAIR's rights under FOIA, including but not limited to those set forth in 5 U.S.C. § 552(a)(6).
38. As of the date of this Complaint, BOP failed to determine whether to comply with the FOIA Request within the required time period after receipt of that request, and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination.
39. As of the date of this Complaint, BOP has failed to release or produce any records in response to the FOIA Request, in violation of FAIR's rights under FOIA, including but not limited to those set forth in 5 U.S.C. § 552(a)(3)(A).
40. BOP wrongfully is withholding responsive records from FAIR that FAIR requested pursuant to 5 U.S.C. § 552. BOP failed to disclose and produce records responsive to the FOIA Request without a legal basis for withholding such records, in violation of FOIA, including but not limited to 5 U.S.C. §§ 552(a)(3)(A) and (6)(A). The failure and/or refusal of BOP to disclose and produce records responsive to the FOIA Request is improper and unlawful.
41. FAIR is entitled to a complete waiver of all fees in connection with the FOIA Request. As of the date of this Complaint, BOP has not granted that fee waiver.
42. FAIR is entitled to injunctive relief compelling the release and disclosure of the requested records. FAIR is being harmed by reason of BOP's unlawful withholding of the

requested records. FAIR will continue to be harmed unless this Court compels BOP to comply with FOIA and applicable law.

43. FAIR is entitled to declaratory relief that BOP has violated FAIR's rights under FOIA and that FAIR is entitled to receive all non-exempt records requested in the FOIA Request.

44. FAIR is entitled to its reasonable attorneys' fees and other litigation costs under 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, FAIR respectfully requests that the Court:

- (a) Expedite consideration of this action, pursuant to 28 U.S.C. § 1657;
- (b) Find and declare that BOP violated FOIA by failing to respond timely to the FOIA Request, by failing to follow the procedures required by FOIA, and by failing to disclose and release records in response to the FOIA Request;
- (c) Order BOP to conduct an adequate search for any and all records responsive to the FOIA Request, and require BOP to show that it employed search methods reasonably likely to lead to the discovery of the records responsive to the FOIA Request;
- (d) Order BOP to produce and release all non-exempt records responsive to the FOIA Request within twenty (20) business days of the Court's order in this action and to provide FAIR with a *Vaughn* index of any responsive records, material, or information withheld under claim of exemption;
- (e) Enjoin BOP from continuing to withhold any and all non-exempt records responsive to the FOIA Request;
- (f) Enjoin BOP from charging fees or costs for the processing of the FOIA Request (including any fees or costs for the search, review, and production of records);

- (g) Award FAIR its reasonable attorneys' fees and other litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and
- (h) Grant FAIR such other relief as the Court may deem just and proper.

Dated: October 16, 2019

Respectfully submitted,

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